



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 88 of 2003

NATIONAL BANK OF KENYA LTD. APPELLANT

- Versus -

JOHN G. MURAYA RESPONDENT

RULING

In this application, the appellant applies for orders that the bill of costs dated 11th November, 2006 and filed herein on 5th December, 2006 be struck out, and that the Respondent do pay the costs of these proceedings and of the appeal. The application is brought under section 27 of the Civil Procedure Act, Order III Rule 9A of the Civil Procedure Rules, and Schedule VI of the Advocates Remuneration Order.

The application is based on the ground that the respondent never complied with the mandatory legal requirement prior to engaging an advocate to defend him in the appeal in the High Court, and is supported by the annexed affidavit of George Ouma Ojiambo, the appellant's manager at Nkrumah Road, Mombasa.

Opposing the application, Ms. Victoria N. Okata, an Advocate in the firm of V.N. Okata & Co. Advocates who have the conduct of this matter on behalf of the respondent, filed a replying affidavit sworn on 28th May, 2007.

At the oral canvassing of this application, Mr. Mulika appeared for the applicant and Mr. Onyango held brief for Ms. Okata for the Respondent. Mr. Mulika stated that after the filing of this appeal against the decision of the lower court, they were served with a Notice of Change dated 3rd September, 2004, but they were not served with the application for leave to come on record as judgment had already been entered. The incoming Advocates did not adhere to Order III rule 9A of the Civil Procedure Rules which provides that after judgment no change would be effected without leave. He referred to the case of MBOGO v. ASIKOYO & 3 ORS. [2004] KLR 697 and submitted that failure to comply renders an Advocate improperly on record, and such Advocate is not entitled to audience. He therefore urged the court to strike out the bill of costs, with costs to the Appellant.

Responding to those submissions, Mr. Onyango submitted that Order III rule 9A was not applicable and therefore the parties were not bound to obey. He argued that when the firm of V.N. Okata took over from Mogaka Omwenga, there was no judgment and the appeal was later determined by judgment delivered on 1st September, 2006.

Counsel further submitted that Section 27 of the Civil Procedure Act, Order III rule 9A of the Civil Procedure Rules and Schedule VI of the Advocates Remuneration Order under which the application was premised do not provide any basis for challenging anything and therefore the application was incompetent

and should be dismissed. Mr. Onyango also contended that there was bad faith on the part of the applicants, and that even if the application were allowed, it would not affect the judgment which awarded the costs, and the litigant is bound to come back with a fresh bill of costs. The contested bill is a party and party bill, and not an advocate/client bill of costs. Mr. Onyango urged the court to dismiss the application with costs since the Respondent's Advocates came on record before judgment was passed.

In reply, Mr. Mulika submitted that the application was not defective; that there was judgment, and therefore the requirement of Order III rule 9A should have been complied with.

I have considered the application and the submission of counsel. The driving philosophy behind Order III rule 9A of the Civil Procedure Rules needs to be clearly understood. The rule itself, so far as is relevant to this application, states as follows –

“When there is a change of advocate ... after judgment has been passed, such change ... shall not be effected without an order of the court upon an application with notice to the advocate on record.”

When this provision is read carefully, it envisions an advocate coming on record after judgment has been passed in a particular matter. In other words, it applies when an advocate seeks to come on record and continue with a matter after judgment. In this case, we are dealing with a matter in its appellate stage. Judgment in the lower court was delivered in favour of the Respondent on 23rd May, 2003. The suit was finalised by the payment of the relevant dues to the Respondent. The memorandum of this appeal was filed on 9th June, 2003, and served on the Advocates who pleaded for the Respondent in the lower court. The record of appeal was thereafter filed on 18th August, 2004 giving the Respondent's address as care of M/S Mogaka Omwenga & Co., the same Advocate who had the conduct of the Respondent's case in the lower court.

After the date of the filing of the appeal, the matter came up in court several times. It first came for directions before P.N. Ngigi on 19th November, 2004. Mr. Sangoro appeared for the appellant and Mrs. Okata for the respondent. The court noted that the appeal record was complete and directed that the appeal be listed for hearing for one day at Mombasa. Thereafter, the appeal came for hearing on 3rd March, 2005 when Mr. Sangoro appeared for the appellant and Mrs. Okata for the respondent. Unfortunately it could not be reached and the court directed that another date be taken at the Registry. The appeal next came for hearing on 24th August, 2005 when Mr. Sangoro appeared for the appellant and Ms Osino held brief for Mrs. Okata for the respondent. The matter could not be reached and it was stood over generally. Finally, it was heard on 6th April, 2006 when Mr. Sangoro appeared for the appellant and Mr. Onyango held brief for Mrs. Okata. Judgment was delivered on 1st September, 2006, dismissing the appeal with costs to the respondent.

The party and party bill of costs which is the subject matter of this application was filed by V.N. Okata & Co., Advocates for the respondent, on 5th December, 2006, and marked for service upon the appellant's advocates. When the bill came for taxation the 1st time, it was stood over to 23rd February, 2007. On the appointed day, Ms Osino held brief for Mrs. Okata. The appellant's advocates did not attend. It was then stood over to 16th March, 2007. Come that day and Mrs. Okata appeared for the Respondents while there was no attendance by or for the appellants. The matter was then stood over generally. Before the matter could be progressed any further, this application was filed on 22nd May, 2007.

I have deliberately chronicled the above occurrences in a bid to demonstrate that the Appellants, who are the applicants herein, went through the whole appellate process in the company of the Respondent's Advocates. They never raised a finger, nor a voice, through the several occasions when the matter came for hearing, and even when the bill of costs was filed, until the same came for taxation. This casts a dark cloud upon the bona fides of this application.

But no matter. The matter into which the Respondent's Advocates came on record was not the case in

the lower court. On 3rd September, 2004 when they received instructions to file a notice of change of Advocates, the case in the lower court had already come to an end. The matter that was then on stage was the appeal. That was long before judgment in this matter was delivered. Seeing that the matter then in progress was the appeal, and not the matter in the lower court, I don't think that the same came within the purview of Order III rule 9A. When M/s V.N. Okata & Co. filed Notice of Change of Advocates on 6th September, 2004, they also copied that Notice to the Appellant's Advocates. Yet the latter never objected. Indeed, the persons who would have objected if there had been anything untoward would have been Mogaka Omwenga & Co., the Respondent's advocates. Instead of objecting, the latter wrote to the Respondent, their erstwhile client, saying –

“We have no objection to the firm of V.N. Okata & Co. Advocates taking over the conduct of this appeal.

Kindly collect your file.”

Being of the persuasion that the appeal was a different matter altogether from the case in the lower court, and noting that M/s Okata & Co., Advocates, came on record early in the appeal with the full blessings of the Respondent's previous Advocates, I don't think that Order III rule 9A came into play. There was no breach, therefore, of any protocol.

This application is accordingly dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 23rd day of May, 2008.

L. NJAGI

JUDGE